Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges	)	WC Docket No. 02-361

JOINT COMMENTS OF
ASSOCIATION FOR COMMUNICATIONS ENTERPRISES,
BIG PLANET, INC., EPHONE TELECOM, INC.,
ICG COMMUNICATIONS, INC.,
AND VONAGE HOLDING CORP.

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Association for Communications Enterprises ("ASCENT"), Big Planet, Inc. ("Big Planet"), ePHONE Telecom, Inc. ("ePHONE"), ICG Communications, Inc. ("ICG") and Vonage Holding Corp. ("Vonage") (collectively, "Joint Commenters"), by their undersigned counsel and pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, respectfully submit the following comments pursuant to the Federal Communications Commission's ("Commission" or "FCC") Public Notice, released on November 18, 2002, regarding the above-captioned proceeding.[1] Joint Commenters strongly encourage the Commission to confirm by declaratory ruling that voice over Internet Protocol ("VoIP") services, of any form, are not subject to access charges.

[1] *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Public Notice, DA 02-3184 (rel. Nov. 18, 2002).

INTRODUCTION AND SUMMARY

As either VoIP service providers, or representatives of VoIP service providers, Joint Commenters are extremely concerned with the self-help mechanisms being employed by certain incumbent local exchange carriers ("ILECs") to impose the above-cost access charge regime on the nascent market of VoIP service offerings. Such actions can only be described as unlawful as they are completely contrary to Commission precedent that has exempted VoIP services from Title II regulations, including access charge requirements.

Joint Commenters applaud AT&T's efforts to resolve this important issue, as the imposition of access charges on VoIP services could only serve to halt future growth and innovation within the nascent VoIP market in contradiction with the Commission's stated goals for this industry. Clarification that access charges are not applicable to VoIP services, in any form, would rightly remove uncertainty in the market on this issue, likely resulting in increased investment in a promising new area of communications.

As Joint Commenters show, nothing has changed since the 1998 *Report to Congress* to justify any policy changes that would no longer allow the nascent market for VoIP services to flourish unfettered by burdensome government regulation while still in its developmental stage. Subjecting VoIP services to onerous access charge regulations would not only raise a variety of customer privacy concerns, but also open the entire VoIP industry to the full panoply of Title II regulations, including direct universal service contribution requirements, regulatory fee requirements, section 214 requirements, and numerous common carrier reporting obligations. In addition, any VoIP access charge policy would be a dramatic departure from the Commission's well-known international stance that the Internet, including VoIP services, should not be regulated.

Joint Commenters request that the Commission rebuff the efforts of certain ILECs to impose access charges on only certain types of VoIP services, such as phone-to-phone services. ILECs would prefer to drive the Commission down the road to industry distortions based on regulatory fictions instead of market forces, as the Telecommunications Act of 1996 ("1996 Act") requires. Joint Commenters also encourage the Commission not to make any artificial regulatory distinctions between VoIP providers with the ability to enter into Internet peering arrangements to the disadvantage of those that do not.

Moreover, Joint Commenters strongly urge the Commission to grant AT&T's request by issuing a declaratory ruling that clarifies the FCC's commitment to the unregulated status of VoIP services as a nascent, developing industry exempt from a burdensome access charge regime meant for traditional forms of circuit-switched technology.

I. BACKGROUND ON FCC REGULATORY TREATMENT OF VOIP SERVICES

Although VoIP services have only recently come into existence, the current unregulated status of these services may be traced back more than twenty years to the FCC's basic and enhanced regulatory decisions in the *Computer Proceedings* in which the FCC decided to allow enhanced services to flourish unregulated and unfettered by Title II of the Communications Act of 1934, as amended ("Act"). Since the 1996 Act, the FCC's basic and enhanced regulatory dichotomy has since evolved into an analysis of whether a service is a regulated telecommunications service or an unregulated information services. Post-1996 Act, there have been many opportunities for the Commission to begin regulation of VoIP services as telecommunications services under the full panoply of Title II regulation, but the FCC has rightly and repeatedly refused to do so.

A. Basic and Enhanced Services Regulatory Scheme Pre-1996 Act.

The FCC established the distinction between "basic services" and "enhanced services" in the Second Computer Inquiry in 1980 ("*Computer II*").[2] There, the FCC defined "basic services" as "the common carrier offering of transmission capacity for the movement of information."[3] In general, a basic service transmits information generated by a customer from one point to another, without changing the content of the transmission. Thus, the "basic" service category was intended to define the transparent transmission capacity that makes up conventional communications service. In *Computer II*, the FCC indicated that because "basic" services are "wholly traditional common carrier activities," they are regulated under Title II of the Act.[4]

By contrast, in *Computer II*, the FCC defined unregulated "enhanced services" as:

> services, offered over common carrier transmission facilities used in interstate communications, which [1] employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; [2] provide the subscriber additional, different or restructured information; or [3] involve subscriber interaction with stored information.[5]

The FCC concluded in *Computer II* that regulation of enhanced services is unwarranted because the market for those services is competitive and consumers benefit from that competition.[6] The

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2 *Second Computer Inquiry*, Final Decision, 77 F.C.C.2d 384 (1980); *modified on recon.* 84 F.C.C.2d 50 (1980); *further modified on recon.* 88 F.C.C.2d 512 (1981); *aff'd. sub nom. Computer and Communications Industries Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied* 461 U.S. 938 (1983) ("*Computer II*").

3 *Id.* at 420.

4 *Id.* at 435.

5 *Computer II* at 387; *see also* 47 C.F.R. § 64.702(a).

6 *Computer II* at 433.

FCC reached this conclusion notwithstanding the close relationship between communications and some services it classified as enhanced:

> We acknowledge, of course, the existence of a communications component. And we recognize that *some enhanced services may do some of the same things that regulated communications services did in the past.* On the other side, however, is the substantial data processing component in all these services.[7]

Prior to the enactment of the 1996 Act, the Commission generally retained and reaffirmed its existing basic/enhanced distinction in subsequent *Computer Proceedings*.[8] In determining whether a service meets the enhanced services definition, the FCC has traditionally applied each clause of the definition against the specific functionalities of the service in question.[9] The service is generally deemed "enhanced" if it meets the language of one of the three clauses, as interpreted by the FCC.

B. Telecommunications Service and Information Service Definitions in 1996 Act.

The 1996 Telecom Act essentially codified the FCC's past decisions regarding the basic/enhanced regulatory dichotomy by creating new regulatory categories designated as "telecommunications service" and "information service," which are fundamentally the equivalent of the FCC's prior categories of basic and enhanced services, respectively.

Specifically, the 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively

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7 *Id.* at 435 (emphasis added).

8 *See Third Computer Inquiry, Phase II*, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd. 1150 (1988) ("*Computer III*").

9 *See, e.g., U S West Communications, Inc. Petition for Computer III Waiver*, Order, 11 FCC Rcd. 1195 (1995); *AT & T 900 Dial-It Services and Third Party Billing and Collection Services*, Memorandum Opinion and Order, 4 FCC Rcd. 3429 (1989).

available directly to the public regardless of the facilities used."[10] The term "telecommunications" is defined as "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[11]

The definition of "telecommunications" and "telecommunications service" in the 1996 Act can be contrasted with "information service" which is defined by the 1996 Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[12]

The FCC's first opportunity to consider the relationship between its traditional basic/enhanced dichotomy and the telecommunications/information service dichotomy adopted in the 1996 Act occurred in the context of establishing safeguards for Regional Bell Operating Company ("RBOC") provision of interLATA services. In the *Non-Accounting Safeguards Order*, the FCC concluded that those protocol processing services that qualify as "enhanced" should be treated as "information services" under the 1996 Act because they satisfy the statutory requirements of offering "a capability for ... transforming [and] processing ... information via

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10 47 U.S.C. § 153(46).

11 47 U.S.C. § 153(43).

12 47 U.S.C. § 153(20).

telecommunications."[13] The FCC indicated in the *Non-Accounting Safeguards Order* that services that result in no net protocol conversion to the end user may continue to be classified as basic regulated services.[14]

C. Universal Service Report to Congress.

In its 1998 Report to Congress on Universal Service ("*Report to Congress*" or "*Report*"), the FCC once again confirmed the parallel relationship between the basic/enhanced regulatory dichotomy and the telecommunications/information services definitions included in the 1996 Act.[15] The FCC concluded that the categories of "telecommunications service" and "information service" contained in the 1996 Act are mutually exclusive and parallel the definitions of "basic service" and "enhanced service" developed in the FCC's *Computer II* proceeding. In this fashion, the Commission decided that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their service "via telecommunications."[16]

The *Report to Congress* presented the Commission with its first opportunity to begin regulating VoIP services as telecommunications services under Title II of the Act, but the FCC explicitly refused to do so. The FCC's refusal to regulate VoIP services in the context of its *Report to Congress* is particularly noteworthy considering that concerns about the unregulated status of VoIP and other Internet services were some of the driving forces behind the Congres-

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13 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 21955-58, ¶¶ 104-7 (1996) ("*Non-Accounting Safeguards Order*").

14 *Id.* at ¶ 106.

15 *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501(1998) ("*Report to Congress*").

16 *Id.* at ¶ 39.

sional mandate for the FCC to issue the *Report*. At the time, the Senators who pushed for the *Report to Congress* to be issued were strongly urging the Commission to find that VoIP and other Internet services should be regulated as telecommunications services.[17]

Instead, in the *Report to Congress*, the FCC considered the existing technology for different types of VoIP services and tentatively determined that certain classes of "phone-to-phone" VoIP services appear to lack the characteristics that would render them unregulated "information services." Characteristics of these classes of "phone-to-phone" VoIP services include:

(1) the provider holds itself out as providing voice telephony;
(2) the provider does not require the customer to use different CPE;
(3) the customer may call telephone numbers assigned in accordance with the North American Numbering Plan; and
(4) the provider transmits customer information without any net change in form or content.[18]

Importantly, the FCC refused to make any definitive regulatory determinations of any class of VoIP services in its *Report to Congress*, at least until a better record on the broad policy issues involved could be established.[19] In coming to this decision, the Commission recognized that regulatory distinctions based on technological differences in VoIP services being offered at that time could quickly be "overcome by changes in technology."[20] Furthermore, the FCC correctly acknowledged that definitive regulatory classifications for VoIP services were not appropriate at that time due to the "emerging" and "dynamic" nature of the Internet services market.[21]

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17 *Id.* at ¶¶ 34-36, 49, 51, 78, 85.

18 *Id.* at ¶ 88.

19 *Id.* at ¶ 90.

20 *Id.*

21 *Id.*

As AT&T pointed out, although the Commission noted in its *Report* that any phone-to-phone VoIP services that are found to be "telecommunications services" *may* be subject to access charges (as well as other Title II regulations), no where in the *Report* did the Commission state that under those circumstances, such services *must* be subject to the same access charges paid by interexchange carriers.[22] Rather, the FCC acknowledged the "difficult" and "contested" issues involved with the placing of switched-circuit access regime on VoIP services, such as whether local exchange carriers ("LECs") even have the ability to determine whether particular VoIP calls are interstate or intrastate in nature.[23]

Moreover, there is no support in the *Report to Congress* for any position of certain ILECs that they are allowed under current federal law to self-impose access charges on certain classes of phone-to-phone VoIP services. Instead, in its *Report*, the FCC specifically refrained from implementing any access charge regime on any class of VoIP services.

D. U S West Petition.

In its *Report to Congress*, the FCC practically invited parties to file petitions seeking a declaration that certain forms of VoIP services were telecommunications services subject to regulation. The first formal petition responding to this invitation was filed with the FCC on April 5, 1999. In its petition, U S West, Inc. ("U S West") asked the FCC for a declaratory ruling that it could impose access charges on VoIP service providers.[24] U S West limited its

22 *AT&T Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, at 14 (filed Oct. 18, 2002) ("*AT&T Petition*") (citing *Report to Congress* at ¶ 91).

23 *Id.* at 15 (citing *Report to Congress* at ¶ 91).

24 *Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony* (filed Apr. 5, 1999) ("*U S West Petition*").

request to providers and services that meet the same "phone-to-phone" characteristics as outlined in the FCC's *Report to Congress*:

(1) the provider holds itself out as providing voice telephony;
(2) the provider does not require the customer to use different CPE;
(3) the customer may call telephone numbers assigned in accordance with the North American Numbering Plan; and
(4) the provider transmits customer information without any net change in form or content.[25]

U S West asked the FCC to determine that services meeting the above criteria are telecommunications, not information, services and that providers must subscribe to LECs' interstate exchange access tariffs for originating and terminating VoIP services. Importantly, the FCC again refused to take the opportunity to regulate VoIP services, and instead never sought public comments on the U S West Petition, or took any other action on it.

E. Telecommunications Reporting Worksheet.

Since the filing of U S West's Petition, the FCC has been faced with another opportunity to clarify that VoIP services should be regulated, had it desired to do so. When the Commission released the new consolidated telecommunications reporting worksheet for carriers use to report revenues, the instructions to the worksheet appeared to indicate that VoIP providers were required to contribute to various federal funds, including universal service.[26] Even though one RBOC asserted that the language in the proposed worksheet did not constitute a change in FCC policy and that providers of such services should not be exempt from contribution requirements,

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25 *Id.; see also* discussion of *Report to Congress, supra,* at 7-8.

26 The instructions as proposed indicated that carriers must contribute to the Universal Service Fund, among others, based on revenue from "calls handled using internet technology as well as calls handled using more traditional switched circuit techniques." *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Notice of Proposed Rulemaking and Notice of Inquiry, 13 FCC Rcd 19295 (1998).

the FCC refused to accept the RBOC's position. Instead, the FCC specifically noted that it had previously decided to defer making pronouncements about the regulatory status of various forms of VoIP services and therefore deleted all language that appeared to change the Commission existing regulatory treatment of VoIP services.[27]

II. FCC SHOULD CONFIRM BY DECLARATORY RULING THAT VoIP SERVICES ARE NOT SUBJECT TO ACCESS CHARGES.

The Commission has broad discretion under its rules to issue a declaratory ruling in order to "remove uncertainty" or to "terminate a controversy" with respect to a particular issue.[28] Consistent with this authority, Joint Commenters strongly urge the Commission to use this proceeding as an opportunity to remove any remaining uncertainty regarding the FCC's current policy of exempting VoIP services from access charges by issuing a declaratory ruling that explicitly confirms this policy. Joint Commenters agree that a declaratory ruling on this important issue is warranted at this point given the unlawful attempts of certain ILECs to circumvent the unregulated status of VoIP services, as well as the issuance of differing state opinions on the matter.

A. Confirmation of VoIP access charge exemption would remove any uncertainty in the market on this issue and thus promote investment in IP services.

Although the FCC has repeatedly refused to regulate VoIP services under the full panoply of Title II regulations, unfortunately, some uncertainty as to the application of access charges to VoIP services appears to exist, as demonstrated by self-help measures by certain ILECs and

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27 *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order, 14 FCC Rcd 16602, ¶ 22 (1999).

28 47 C.F.R. § 1.2.

differing state commission rulings on the issue. The issues presented in this case thus are squarely within the FCC's declaratory ruling authority to remove uncertainty with respect to a particular issue.[29]

In a recent declaratory ruling involving other developing technology issues, the FCC has recognized that the removal of important regulatory uncertainties likely will have the effect of promoting investment, growth and innovation in burgeoning technology markets.[30] Likewise, in the context of VoIP services, a ruling by the Commission that removes any uncertainty as to the inapplicability of access charges to VoIP services could only serve to assist in the development of that market as well.

B. FCC should resolve differing state rulings on the VoIP access charge issue.

As pointed out by AT&T, although two state commissions – the Colorado Public Utility Commission and the Florida Public Service Commission – have followed the FCC's policy of not imposing access charges on VoIP services,[31] one state commission – the New York Public Service Commission ("NYPSC") – has taken the opposite position.[32] Although the NYPSC ignored the FCC's guidance on this issue when it decided to impose above-cost access charges

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29 *See id.*

30 *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* Internet Over Cable Declaratory Ruling, 17 FCC Rcd. 4798, ¶ 5 (2002); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Further Notice of Proposed Rulemaking and Declaratory Ruling, 15 FCC Rcd. 18199, ¶ 14 (2000).

31 *AT&T Petition* at 21-22 (*citing Petition of ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with U S West Communications, Inc.*, No. C00-858 (Colo. Pub. Util. Comm'n Aug. 1, 2000) and *Investigation into Appropriate Methods to Compensate Carriers for Exchange Traffic Subject to Section 251 of the Telecommunications Act of 1996*, No. 000075-TP (Fl. Pub. Serv. Comm'n May 31, 2002)).

32 *Id.* at 21-22 (*citing Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, No. 01-C-1119 (N.Y. Pub. Serv. Comm'n May 31, 2002)).

on VoIP services,[33] it is reasonable to assume other state commissions may follow the path of the NYPSC in contravention of the FCC's current regulatory policy towards VoIP services.

As a newly developing technology, VoIP cannot be exposed to different regulatory regimes across the country. Such circumstances would only serve to hinder the growth and progress of VoIP services as providers become forced to expend valuable resources on unwieldy administrative issues involved in responding to potentially 50 state regulatory regimes.

With only one state commission at this point implementing a VoIP access charge regime, the Commission is in a perfect position, through this proceeding, to halt the spread of other similar state regulatory burdens on the developing market of VoIP services by issuing a declaratory ruling that explicitly confirms its current policy of exempting VoIP services from access charges. Such a ruling will provide further guidance to the states on this issue and thus resolve the regulatory discrepancies with respect to the imposition of access charges on VoIP services.

C. ILECs cannot be allowed to continue unlawful self-help measures.

In its *Petition*, AT&T described several self-help methods currently being employed by certain ILECs in an attempt to circumvent the FCC's policy of not subjecting VoIP services to access charges. Most notably, according to AT&T, at least one RBOC has begun assessing AT&T access charges on certain prepaid and phone-to-phone VoIP services,[34] and another ILEC has even refused to terminate certain VoIP calls and instead routed them to "dead air."[35]

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33 *Id.*

34 *Id.* at 20.

35 *Id.* at 21.

The FCC has determined that "self-help" actions by ILECs comparable to those described by AT&T are contrary to federal law and to the establishment of a competitive market. For example, in an arbitration order ("*Arbitration Order*"), the FCC specifically declined to give the ILEC the authority that it sought to discontinue unilaterally transit service necessary for the completion of calls between competitive LECs and other third party LECs, or to discontinue unilaterally trunk service used for the completion of calls between the ILEC and the competitive LEC.[36]

As the FCC determined in the *Arbitration Order*, allowing an ILEC to terminate, at the incumbent's sole discretion, service that is necessary for a competitor to complete calls on the Public Switched Telephone Network ("PTSN") is not reasonable and creates a risk of service disruption to the competitor's end users.[37] Allowing an ILEC to terminate service abruptly is inconsistent with the fundamental purpose of Section 201 of the Act and puts VoIP providers at a severe competitive disadvantage while undermining the interests of all end-users in connectivity to the PSTN.[38]

Moreover, any argument by ILECs that the FCC has provided no exemption from access charges for VoIP services is inconsistent with the FCC's current regulatory regime for VoIP services in which such services are "exempt from the access charges that traditional long-

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36 *See Petition of Worldcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration*, CC Docket. No. 00-218, Memorandum Opinion and Order, ¶¶ 115-118, 140 (Wireline Comp. Bureau July 17, 2002) ("*Arbitration Order*").

37 *Id.* at ¶ 115.

38 *Id.* at ¶ 118.

distance carriers must pay."[39] Given that the FCC has not mandated that access charges be imposed on any type of VoIP services, the self-help measures being employed by certain ILECs are clearly unlawful. These ILECs cannot be allowed to continue to implement unlawful self-help methods to the detriment of the developing VoIP services market.

The Commission should act promptly on the issues in this proceeding and should not allow the ILECs to assume the role of self-interested "policemen" and terminate connections to the PSTN as they unilaterally deem necessary and appropriate. Commission failure to address the ILECs' unilateral conduct inevitably invites similar conduct by other carriers in a multi-provider market with the end users being the ultimate victims. Failure to so correct this behavior will create significant barriers to entry for competitors and will give all carriers free license to take actions they think appropriate where there is a mere allegation of illegality and no conclusive findings by the Commission.

Accordingly, Joint Commenters submit that the FCC should issue a declaratory ruling that not only confirms the inapplicability of access charges to VoIP services, but also explicitly directs carriers to refrain from utilizing any self-help measures that contravene the FCC's access charge exemption for VoIP services. If a carrier seeks a determination that a particular IP service should be subject to access charges, the burden is on that carrier to seek a declaration from the FCC.

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[39] *See Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, ¶ 133 (2001).

III. FCC SHOULD NOT IMPOSE ACCESS CHARGES ON VOIP SERVICES.

As demonstrated in AT&T's *Petition*, certain ILECs have taken it upon themselves to do exactly what the FCC has repeatedly refused to do – namely, impose access charges on certain types of VoIP services.[40] Implicit in these self-help measures is the desire by these ILECs for the Commission to change its regulatory policy towards VoIP services and impose access charges on certain classes of those services. Almost five years ago in its *Report to Congress*, the FCC considered implementing such a policy, but found that circumstances in existence in the developing VoIP market did not warrant the imposition of burdensome Title II regulations, including above-cost access charges, at that time.[41]

Joint Commenters submit that the reasons underlying the Commission's refusal in its *Report* to adopt an access charge regime for VoIP services, including its concern regarding the nascent and rapidly evolving state of the VoIP market, continue to apply in the VoIP service market of today. As a result, the Commission should retain its current deregulatory policy towards VoIP services and not impose on such services traditional circuit-switched above-cost access charges that likely would serve only to stunt growth and stifle innovation in that developing market.

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40 *AT&T Petition* at 20-21.

41 *Report to Congress* at ¶¶ 90-93.

A. Imposition of above-cost access charges intended for traditional circuit-switched services is likely to distort pricing incentives, as well as stunt growth and stifle innovation, in the nascent packet-switched IP services market.

As cited by AT&T, the VoIP market is still in infancy with only 1-5% of the interexchange ("IXC") market share almost five years after the FCC's *Report to Congress*.[42] Today VoIP technologies continue to be described as new, innovative technologies in the midst of rapid development and growth.[43] While many anticipate that VoIP technology will eventually replace traditional circuit switches, it is clear that the VoIP market is no where near that high of a penetration level at this time.[44]

Given the continued emerging state of VoIP services, Joint Commenters strongly urge the Commission not to change its deregulatory policy for IP services and impose above-cost access services that were intended for traditional switched service on the new, emerging VoIP services market. As Chairman Powell acknowledged in the *Report to Congress*, a policy of imposing the traditional regulations on IP services could serve to merely "stifle innovation and competition in direct contravention of the [1996] Act."[45]

Instead, the Commission should look to its regulatory policies in the Internet Service Provider ("ISP") market as an example of how deregulation successfully facilitated explosive growth and innovation in a new communications market. The Commission's deregulatory policies toward ISPs can be traced back almost twenty years to when the FCC decided to allow

42 *AT&T Petition* at 27 (*citing* Probe Research, Inc., *Voice over Packet Markets*, 2 CISS Bulletin 11-16, at 4 (2001)).

43 *See TBR Business Briefs: Growth Seen for IP-PBX Systems*, Teleco Business Report, Vol. 19, No. 21, Oct. 21, 2002; *FCC and NTIA Call for Regulatory Protection for VoIP*, Warren's Cable Regulation Monitor, Vol. 10, Issue 33, Aug. 26, 2002 ("*FCC/NTIA VoIP Article*").

44 *See id.; see also* Mark Wigfield, *Unregulated Internet Telephony Tries to Stay Unfettered*, Dow Jones Business News, Nov. 25, 2002.

information service providers to subscribe to local services as end-user rather than as a regulated carrier, and thus become exempt from access charge requirements.[46] As AT&T pointed out in its *Petition*, the Commission, in its efforts to reform access charges in 1997, specifically noted that the rapid development of ISPs may not have been possible had access charges historically been applied to them.[47]

Furthermore, in the FCC's continued efforts to reform the access charge regime, the Commission has stated that one of its policy goals is to bring access charges to cost, and that artificially high charges distort competitive markets.[48] Joint Commenters submit that the Commission should not aggravate any existing market distortions by subjecting any additional services, including VoIP services, to access charges until it has completely eliminated implicit cross-subsidies from those charges.

B. Obtaining the packet information data needed for application of access charges, if even possible, would be expensive and raise privacy concerns.

As explained by AT&T in its *Petition*, many VoIP services do not pass information that would allow a terminating carrier to determine whether a particular call is phone-to-phone, computer-to-phone or some other type of enhanced services.[49] In essence, given the current state of IP technology, for many VoIP services, the terminating carrier cannot discern whether a call

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45 *Report to Congress*, Separate Statement of Commissioner Powell at 2.

46 *AT&T Petition* at 7 (*citing MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 77 (1983)).

47 *Id.* (citing *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, ¶ 344 (1997) ("*First Access Charge Reform R&O*").

48 *See Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd. 12962, ¶ 2 (2000); *First Access Charge Reform R&O* at ¶ 263.

49 *AT&T Petition* at 17.

originated on a phone (IP-enabled or otherwise), a computer, or some device that is both phone and computer.

Joint Commenters also bring to the Commission's attention the privacy issues involved in passing along the information needed for a terminating carrier to determine the originating telephony equipment. If VoIP providers were required to pass along the information necessary to make this determination, as a practical matter, they would need to ascertain the origin, destination and nature of each packet for each of its customers. Any anonymity and expectation of privacy associated with the provision of VoIP service essentially would be lost.

In addition to privacy concerns, VoIP providers have legitimate concerns regarding the cost of monitoring VoIP services in such a manner. As experienced VoIP providers and representatives of VoIP providers, Joint Commenters submit that monitoring each packet likely would be expensive, if it could be done at all. Further, given that the jurisdictional nature of packets cannot easily be discerned in VoIP services, if at all, any attempts by the Commission to impose access charges on interstate services only likely would not be feasible from a practical standpoint. In fact, the FCC expressed concern about making such interstate versus intrastate distinctions as another reason for refusing to regulate VoIP services as telecommunications services.[50]

C. The evolving nature of VoIP services makes it difficult if not impossible for FCC to adopt access charge rules that will not be overcome by changes in IP technology.

The FCC specifically recognized the "emerging" nature of VoIP services in deciding not to impose Title II regulatory requirements on VoIP services in its *Report to Congress*.[51] Since

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50 *Report to Congress* at ¶ 91.

51 *Id.* at ¶ 90.

that time, Chairman Powell[52] and former-Commissioner Ness, [53] among others in the industry,[54] also have acknowledged the rapid development of VoIP technology.

As explained by AT&T in its *Petition*, IP technology encompasses an evolving continuum of services.[55] The ever-changing and developing nature of IP applications makes it difficult, if not impossible, to categorize such services and adopt a definition that will not be overcome by innovations in technology. In fact, the difficulty in categorizing classes of VoIP services was cited by the FCC as one of the reasons it deferred any definitive conclusions on the regulation of such services in its *Report to Congress*.[56]

Although some ILECs may attempt to argue that a "narrowed" definition of phone-to-phone VoIP services would ensure that only particular types of VoIP service are subjected to access charges, any such proposal would ignore the fact that in certain cases, a call could begin on an IP-enabled "phone" and, due to enhancements, still fit within the enhanced services test that exists under federal law. In other words, while it is possible that some VoIP services are not enhanced, that possibility does not justify a conclusion that all such services, or even a subset of such services, are *never* enhanced.

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52 *Agenda and Plans for Reform of the FCC: Hearing before the Telecommunications and Internet Subcommittee of the House Energy and Commerce Committee*, 107th Cong. 24, Testimony of Chairman Powell (Mar. 29, 2001). "One of the reasons I tend to resist prematurely intervening in the context of IP telephony is because it is engaged in a wonderful period of innovation, experimentation . . . and consumers are really reaping the benefits of deployment." *Id.*

53 Remarks of Commissioner Susan Ness (as prepared for delivery), Information Session – WTFP (Mar. 7, 2001) ("*Commissioner Ness Remarks*")

54 *See FCC/NTIA VoIP Article* at 1.

55 *AT&T Petition* at 10-12, 17, 27-29.

56 *Report to Congress* at ¶ 90.

Certainly, most would agree that some of the important benefits of IP technology are, in fact, the multitude of ways in which communication may be initiated (by a personal computer, a wireline phone, a wireless phone, a wireless personal digital assistants ("PDAs"), etc.) and the wide array of services that can be provided using IP technology, such as real-time voice communications, video conferencing, data transmissions, e-mail processing and storage, etc. Given the diversity and rapid development of VoIP-enabled equipment and service applications, any attempt by the Commission to create VoIP access charge regulatory distinctions based on a particular class of VoIP technology (such as phone-to-phone) likely would be quickly outdated by IP technological developments. Moreover, Joint Commenters share in Chairman Powell's confidence that "any attempt to craft a rule to cover a class of IP-based service and technology will be almost immediately frustrated by innovative changes to the service and technology that these advanced networks allow.[57]

D. Any decision to impose access charges on VoIP services will have collateral regulatory impact on a market built on a deregulatory environment.

A decision regarding the imposition of access charges on even certain classes of VoIP services cannot be made by the Commission without consideration of the collateral regulatory impact of such a determination. The application of access charges to even a particular type of VoIP service likely will have regulatory implications far beyond the intercarrier compensation regime.

For example, other regulatory issues that undoubtedly would be implicated by the implementation of a VoIP access charge regime include: (1) whether VoIP providers should be

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57 *Report to Congress*, Separate Statement of Commissioner Powell at 3-4.

subject to section 214 requirements;[58] (2) whether VoIP providers should pay regulatory fees;[59] and (2) whether VoIP providers are required to contribute directly to the various federal administrative funds, including universal service.[60] The FCC also would need to consider the applicability of the Commission's local number portability requirements to VoIP service offerings,[61] as well as compliance with various federal reporting requirements.[62]

Moreover, the proper classification of VoIP services is a complex technical and legal issue demanding in-depth factual analysis and the consideration of many policy objectives before broad declarations are made about how such services should be characterized. The FCC recognized the importance of this approach when it refused to impose universal service and other common carrier requirements on VoIP services in its *Report to Congress*,[63] and the Commission should continue to do so. Joint Commenters thus urge the Commission to be mindful of the potentially far-reaching regulatory implications outside the intercarrier compensation regime that could result from any decision to impose access charges on any particular type of VoIP services.

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[58] *See* 47 U.S.C. § 214.

[59] *See* 47 U.S.C. § 159.

[60] *See* 47 C.F.R. §§ 54.706, 708, 709 & 711 (*Universal Service Fund Rules*); 47 C.F.R. § 64.604 (*Telecommunications Relay Service Rules*); 47 C.F.R. § 52.17 (*North American Numbering Plan Administration Rules*); 47 C.F.R. § 52.32 (*Local Number Number Portability Fund Rules*).

[61] 47 C.F.R. § 52.21, *et seq.*

[62] *See, e.g.*, 47 C.F.R. § 54.711 (*Telecommunications Reporting Worksheets*); 47 C.F.R. § 64.1180 (*Slamming Complaint Reports*); 47 C.F.R. § 43.11 (*Local Competition and Broadband Reports*); 47 C.F.R. § 64.1900 (*Annual Geographic Rate Averaging and Rate Integration Certifications*).

[63] *Report to Congress* at ¶ 91 (noting the various other regulatory requirements that would be implicated if the FCC decided that VoIP services should be regulated as common carrier services, including access charge requirements, tariff requirements, section 214 requirements, CALEA requirements, section 255 (access by persons with disabilities) requirements, section 256 requirements (coordination for interconnectivity), and "certain fees, reporting and filing requirements.")

E. Imposing access charges on VoIP services would be inconsistent with the FCC's international advocacy position and its efforts to put downward pressure on international settlement rates through VoIP.

In its *Report to Congress*, the FCC specifically recognized the Commission's international advocacy position that IP telephony "serves the public interest by placing significant downward pressure on international settlement rates and consumer prices."[64] The Commission stated in its *Report* that alternative calling mechanisms such as VoIP are an "important pro-competitive force in the international telecommunications services market."[65]

Since the issuance of the *Report to Congress*, the FCC has repeated this position in the international arena through then-Commissioner Ness who advised the International Telecommunication Union during a three-day IP telephony forum in 2001 of the Commission's position on the deregulation of VoIP services, stating that the *Report*:

> preserved the *unregulated status of IP telephony*, although we noted that we would determine on a case-by-base basis whether certain phone-to-phone IP telephony – as opposed to computer-to-computer IP telephony configurations – may be properly classified as telecommunications services. Our decision to adopt a case-by-case approach, rather than make definitive pronouncements in the absence of a complete record on specific offerings, was prudent due to the nascent state of the technology. As in other instances, the FCC recognized the dynamism of the Internet and the need to consider whether any tentative definition of IP telephony would be quickly overcome by technological changes.[66]

Any decision to impose access charges on VoIP services would constitute a change in the Commission's deregulatory policy towards IP telephony services and thus a change in its international position regarding the proper regulation of VoIP services. In doing so, the U.S. would

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64 *Id.* at ¶ 93 (*citing Rules and Policies on Foreign Participation in the U.S. Telecommunications Market and Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23891 (1997)).

65 *Id.*

face a serious loss of credibility in the international arena, considering its long-standing stance against the regulation of Internet applications, including VoIP.[67] Joint Commenters therefore strongly recommend that FCC consider the impact of any change in its regulatory policy towards VoIP services on the Commission's stated goals of reducing settlement rates and prices for international services.

IV. FCC CANNOT IMPOSE ACCESS CHARGES ONLY ON CERTAIN TYPES OF VOIP SERVICES AS CERTAIN ILECS ARE ATTEMPTING TO DO WITH THEIR UNLAWFUL SELF-HELP MEASURES.

According to AT&T, certain ILECs are utilizing unlawful self-measures that impose access charges on certain types of phone-to-phone VoIP services that they have deemed as covered under the FCC's access charge regime.[68] The Commission should refrain from following these ILECs actions, as the imposition of access charges on any particular class or classes of VoIP services will result in distorted investment based on regulatory distinctions instead of market forces. Joint Commenters also urge the Commission to avoid making any regulatory distinction based upon a provider's ability to enter into an Internet peering arrangement, as such a regulatory regime would discriminate against smaller carrier that have not entered into such agreements.

A. Imposition of access charges on only certain types of VoIP services will distort investment in industry based on regulatory treatment, not market forces.

As AT&T noted in its *Petition*, computer-to-phone and phone-to-phone VoIP services are technologically similar in most ways, except that the initial IP conversion takes place at the computer in the case of computer-to-phone services and at the gateway in the case of phone-to-

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66 *Commissioner Ness Remarks* at 1 (emphasis added).

67 *See Report to Congress*, Separate Statement of Commissioner Powell at 4.

68 *AT&T Petition* at 20-21.

phone services.[69] As the Commission knows, various forms of computer technology are converging with traditional wireline and wireless handsets, blurring the lines between computers and telephone handsets. Accordingly, any regulatory distinction between computer-to-phone and phone-to-phone VoIP services, including the imposition of access charges on phone-to-phone services only, would not reflect the similarity of the two types of communications, which are able to follow the same path over the same underlying facilities using the same protocol.

Instead, such distinctions would necessarily constitute regulatory fictions that would serve only to discourage investment in phone-to-phone VoIP services, while at the same time encouraging investment in seemingly identical computer-to-phone VoIP. As previously described, the VoIP services market is still in its infancy and innovative growth period.[70] It would be contrary to the public interest to regulate only certain types of services in such a nascent market, particularly when the technological differences are so minimal. The solution, however, is not to impose regulation on all VoIP flavors, as ILECs may seek to have the Commission do. Rather, the solution is to continue the Commission's hands-off regulatory policy that permits the VoIP market to develop free of unnecessary government intervention.

B. Access charge distinctions determined by a provider's ability to enter Internet peering arrangements would discriminate against smaller providers without such peering arrangements.

Although Joint Commenters generally support AT&T's *Petition*, Joint Commenters urge the Commission not to adopt any VoIP access charge distinctions that would be determined by a provider's ability to enter into Internet peering arrangement, as suggested by AT&T.[71] AT&T,

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69 *AT&T Petition* at 11.

70 *See* discussion on nascent state of VoIP services, *supra*, at 15-17.

71 *AT&T Petition* at 24.

as one of the largest interexchange carriers, connects its Internet backbone facilities to the public Internet through peering arrangements. In its *Petition*, AT&T suggests that due to this configuration, its VoIP services are provided over the public Internet and thus should be exempted from access charge regulation.

Although Joint Commenters strongly support the general proposition that VoIP services should not be subject to access charges, Joint Commenters do not believe that only those providers that enter into peering arrangements should be exempted from such regulations. Many smaller VoIP providers may not have the same opportunities as larger carriers like AT&T to enter into Internet peering arrangements. Similar to the computer-to-phone and phone-to-phone analysis discussed in the previous section, regulatory classifications of VoIP services should not be based on slight differences that do not affect the basic underlying technological similarities. Moreover, any access charge distinctions based on Internet peering arrangements would discriminate against smaller providers that might not have the same opportunities to enter into such arrangements and thus should not be adopted by the Commission. Because technological and service innovation is often driven by the competition small upstarts bring to markets, these smaller providers should enjoy the same benefits of freedom from regulation as larger providers.

CONCLUSION

For the reasons stated herein, Joint Commenters strongly urge the Commission to grant AT&T's request by issuing a declaratory ruling that clarifies that all types of VoIP services are exempt from access charges. Joint Commenters agree with AT&T that resolution of this issue by declaratory ruling is warranted because such explicit clarification of the access charge exemption for VoIP services would remove uncertainty and a controversy that currently exists, as demonstrated by the self-help measures taken by certain ILECs and the differing state commission opinions with respect to the same issue.

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Dated : December 18, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2002, copies of the foregoing ***Joint Comments of Association for Communications Enterprises, Big Planet, Inc., ePHONE Telecom, Inc., ICG Communications, Inc., and Vonage Holding Corp.***, WC Docket No. 02-361, were served via Federal Express to the following:

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